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CITATIONS

788-241—65——1

Miscellaneous:

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. —

SECURITIES AND EXCHANGE COMMISSION, PETITIONER

v.

NEW ENGLAND ELECTRIC SYSTEM, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

The Solicitor General, on behalf of the Securities and Exchange Commission, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, pp. 1a–23a) is reported at 346 F. 2d 399. The findings and opinion of the Securities and Exchange Commission, dated March 19, 1964 (R. 1254–1282), are unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 4, 1965 (App. A, *infra*, p. 24a). On Sep-

tember 2, 1965, Mr. Justice Black extended the time to file a petition for a writ of certiorari to and including October 2, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Section 11(b)(1) of the Public Utility Holding Company Act of 1935, 15 U.S.C. 79k(b)(1), permits a registered holding company to control one or more integrated public-utility system in addition to its principal integrated system only if the Commission finds, *inter alia*, that "Each of such additional systems cannot be operated as an independent system without the loss of substantial economies which can be secured by the retention of control by such holding company of such system * * *." The question presented is whether the court erred in rejecting the Commission's longstanding interpretation that, under this provision, "the loss of substantial economies" must be such as to render the additional system incapable of sound and economical operation independent of the principal system.

STATUTE INVOLVED

Section 11(b)(1) of the Public Utility Holding Company Act of 1935, 49 Stat. 820, 15 U.S.C. 79k(b)(1), provides in pertinent part:

> It shall be the duty of the Commission, as soon as practicable after January 1, 1938:
>
> (1) To require by order, after notice and opportunity for hearing, that each registered holding company, and each subsidiary company

thereof, shall take such action as the Commission shall find necessary to limit the operations of the holding-company system of which such company is a part to a single integrated public-utility system, * * * *Provided, however,* That the Commission shall permit a registered holding company to continue to control one or more additional integrated public-utility systems, if, after notice and opportunity for hearing, it finds that—

(A) Each of such additional systems cannot be operated as an independent system without the loss of substantial economies which can be secured by the retention of control by such holding company of such system * * *.

STATEMENT

On August 5, 1957, the Securities and Exchange Commission instituted proceedings under Section 11(b)(1) of the Public Utility Holding Company Act of 1935, 15 U.S.C. 79k(b)(1), to determine the extent to which New England Electric System ("NEES"), a registered holding company, could lawfully retain control over the electric, gas and other properties in its holding company system. The initial phase of the proceedings terminated on February 20, 1958, when the Commission held that the electric utility subsidiaries of NEES comprised an "integrated electric utility system" as defined in Section 2(a)(29)(A) of the Act, 15 U.S.C. 79b(a)(29)(A).[1] NEES elected to retain its electric system as its "single" or "principal"

[1] *New England Electric System*, 38 S.E.C. 193.

system, and the Commission proceeded to conduct hearings on the question whether its gas utility subsidiaries, which all parties agreed to consider as an "integrated gas utility system" (see 15 U.S.C. 79b(a)(29)(B)), could be retained as an "additional" integrated utility system under Section 11(b)(1).[2]

At the commencement of the gas integration proceedings, NEES controlled, *inter alia,* fourteen electric utility companies, eight gas utility companies, and a service company. Its electric companies served 824,000 retail customers in a franchise area of 4,600 square miles within the States of New Hampshire, Massachusetts, Rhode Island and Connecticut (R. 1256–1257).[3] Its gas companies provided retail service to 237,000 customers in a franchise area of 660 square miles entirely within Massachusetts. Seventy-five percent of this area was also part of the franchise area of NEES's electric subsidiaries (R. 1257). Of the twelve nonaffiliated Massachusetts gas companies which respondents selected for comparison with NEES, only one exceeded the NEES gas utility system in size of gross plant, gross annual revenues and number of customers (R. 1272, n. 24).

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[2] NEES has not contested the Commission's longstanding interpretation that an "integrated public-utility system" cannot include both gas and electric utility properties. See *Columbia Gas & Electric Corp.*, 8 S.E.C. 443, 461–463; *The United Gas Improvement Co.*, 9 S.E.C. 52, 77–83.

[3] Unless otherwise indicated, the figures used in the record are for the year ended December 31, 1958, which was the latest year for which audited financial statements were available at the time of the hearings (R. 1257).

After a full hearing, the Commission determined that the divestment of NEES's gas utility companies would not result in a loss of substantial economies to those companies within the meaning of Section 11 (b)(1)(A) (R. 1255–1280) and ordered that they be divested (R. 1280–1281). In so holding, the Commission applied the same interpretation of "loss of substantial economies" that it had applied in every other divestiture case under Section 11(b)(1):[4] *i.e.*, "such additional system cannot be operated under separate ownership without the loss of economies so important as to cause a serious impairment of that system" (R. 1262–1263). Under this test, the Commission held that, on the basis of the record before it, it was unable "to find that the gas companies could not be soundly and economically operated independently of NEES * * *" (R. 1279).[5]

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[4] A list of the holding companies which have been ordered to divest assets under the Commission's interpretation of the statutory test is included as Appendix B to this petition. For situations in which the Commission has held that "additional" systems are retainable under its construction of "substantial economies", see, *e.g.*, *North American Co.*, 11 S.E.C. 194, 243–244; *Republic Service Corp.*, 23 S.E.C. 436, 451; *Federal Light & Traction Co.*, 15 S.E.C. 675, 683; cf. *North American Co.*, 32 S.E.C. 169, 178–180.

[5] The Commission noted that NEES had attempted to sell its gas properties, as a unit, in the early 1950's. The sale was not consummated, however, because the high bidder was unable to obtain the required financing (R. 1258, 1264, n. 13). In its application for Commission approval for the sale, NEES indicated that the sale of the gas properties was proposed as a step in effectuating compliance with the integration provisions of Section 11(b)(1). See Holding Company Act Release No. 11016 (Jan. 22, 1952).

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On petition for review, the court of appeals reversed. The court's holding was not that the Commission's conclusions were unwarranted under the test which it had applied; the court based its reversal on the ground that the Commission had misinterpreted the statutory phrase "loss of substantial economies" (App. A, *infra*, pp. 6a–16a). Expressing its agreement with the dissenting opinion in *Engineers Public Service Co.* v. *Securities and Exchange Commission*, 138 F. 2d 936, 944–945 (C.A.D.C.), certiorari granted, 322 U.S. 723, vacated with directions to dismiss the petition for review as moot, 332 U.S. 788 (App. A, *infra*, p. 4a, n. 3), the court held that Section 11(b)(1)(A) "called for a business judgment of what would be a significant loss, not for a finding of total loss of economy or efficiency" (App. A, *infra*, p. 14a). In reaching this conclusion, the court rejected the Commission's view of the legislative history, which had been accepted by the Court of Appeals for the District of Columbia Circuit in *Philadelphia Co.* v. *Securities and Exchange Commission*, 177 F. 2d 720, 725. Instead it relied on language in the Act's statement of purposes, "the tenor of which was that holding companies had been found uneconomical to investors and to the public" (App. A, *infra*, p. 13a) and on its view that the Act has a "symmetry," which the Commission's interpretation destroys (App. A, *infra*, p. 14a). Finding that "on the record there could have been [a] finding in NEES's favor on the appropriate standard" (App. A, *infra*, p. 16a), the court remanded the case to the Commission.

REASONS FOR GRANTING THE WRIT

The decision below is directly in conflict with the decisions of the District of Columbia Circuit in *Engineers Public Service Co.* v. *Securities and Exchange Commission,* 138 F. 2d 936, certiorari granted, 322 U.S. 723, vacated with directions to dismiss the petition for review as moot, 332 U.S. 788, and *Philadelphia Co.* v. *Securities and Exchange Commission,* 177 F. 2d 720. It also is inconsistent with a decision of the Second Circuit and may be at variance with one of the Fifth Circuit.[6] In reaching its decision, the court below rejected the Commission's longstanding interpretation of Section 11(b)(1)(A) in favor of a reading which, we believe, is inconsistent with the basic policies of the Act. As we pointed out in our petition for certiorari, which the Court granted, in *Securities and Exchange Commission* v. *Louisiana Public Service Commission,* 353 U.S. 368, reversing on jurisdictional grounds 235 F. 2d 167 (C.A. 5), the definitive determination of the meaning of clause (A) may affect substantial utility interests in all parts of the country. Since then, the number of companies potentially affected by that determination has increased. If allowed to stand, therefore, the decision below would seriously interfere with the proper administration of Section 11, which this Court has recognized to be "the very heart" of the Act. *North American Co.* v. *Securities and Exchange Commission,* 327 U.S. 686, 704, n. 14.

[6] *North American Co.* v. *Securities and Exchange Commission*, 133 F. 2d 148 (C.A. 2), affirmed on the constitutional issue, 327 U.S. 686; *Louisiana Public Service Commission* v. *Securities and Exchange Commission*, 235 F. 2d 167 (C.A. 5), reversed on jurisdictional grounds, 353 U.S. 368.

1. In both the *Engineers* and the *Philadelphia Co.* cases, the District of Columbia Circuit expressly considered and approved the Commission's interpretation of Section 11(b)(1)(A). Like the present case, those cases involved the question whether a holding company with a principal electric utility system could retain its gas properties as an additional system. In ruling on the meaning of "loss of substantial economies" under Section 11(b)(1)(A), the court stated in the *Engineers* case (138 F. 2d at 944):

> "Substantial economies" means something different and, we think, something more than substantial savings in operational expenses. Congress could have said that the divorcement shall not be decreed if the controlling utility or the controlled utility show at a hearing that the cost to operate the latter separately from the former would be substantially greater. * * * "Substantial economies" must mean * * * "important economies." The required *importance* must relate to the healthful continuing business and service of the freed utility.[7] * * *

In *Philadelphia Co.*, the court observed (177 F. 2d at 725):

> In the Commission's view, economies are not "substantial" unless their loss "would cause a serious economic impairment of the system"

[7] The court further observed that "Congress was not so much concerned with the profit motive of utilities as with the evils that had become prevalent through combinations of utilities. It was first concerned with the wiping out of the evils which the practice of utility combinations had produced, and Congress only consented to dull the blade of its chosen weapon in proved hard cases." 138 F. 2d at 944.

> such as to "render it incapable of independent economical operation." * * * We cannot say the Commission's understanding of the term "substantial economies" is wrong. We construed it similarly in the Engineers case.

The court expressly noted in that case that its interpretation of the Act—which is the same as the Commission's—is fully supported by the legislative history (177 F. 2d at 725).[8]

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[8] The court made specific reference to the Statement of the Managers on the Part of the House accompanying the Conference Report, H. Rep. No. 1903, 74th Cong., 1st Sess. (1935), and to the remarks of Senator Wheeler, the chief Senate conferee, 79 Cong. Rec. 14479 (August 24, 1935). In pertinent part, the House Managers' statement is as follows (pp. 70–71):

> * * * Section 11 of both [House and Senate] bills * * * authorizes the * * * Commission to require a holding company to limit its control over operating utility companies to one integrated public-utility system.
>
> * * * * *
>
> The conference substitute meets the House desire to provide for further flexibility by the statement of additional definite and concrete circumstances under which exception should be made to the form of one integrated system. * * *
>
> The substitute, therefore, makes provision to meet the situation where a holding company can show a real economic need on the part of additional integrated systems for permitting the holding company to keep these additional systems under localized management with a principal integrated system.

Senator Wheeler's statement, given a few moments after the Senate had agreed to the Conference Report, was that:

> * * * the Senate conferees concluded that the furthest concession they could make would be to permit the Commission to allow a holding company to control more than one integrated system if the additional systems * * * were so small that they were incapable of independent economical operation * * *.

The decision below is directly in conflict with these decisions of the District of Columbia Circuit. That court read "substantial economies" as meaning "something more than substantial savings in operational expenses" (*Engineers*), *i.e.*, economies whose "loss 'would cause a serious economic impairment of the system' such as to 'render it incapable of independent economical operation'" (*Philadelphia Co.*). The court below, on the other hand, held (App. A, *infra*, pp. 15a, 14a) that "substantial economies" means only "economies which in ordinary business parlance and by ordinary business standards are of a substantial nature," loss of which would be "a significant loss, not * * * total loss of economy or efficiency." Indeed, the court below implicitly recognized that its decision was in conflict with *Engineers*, since it stated (App. A, *infra*, p. 4a, n. 3) that it agreed with the dissenting opinion of Judge Soper in that case.

Moreover, as the court below recognized (App. A, *infra*, p. 6a), even before its decision was rendered "there [was] no uniformity of judicial view" as to the meaning of Section 11(b)(1)(A). In *North American Co.* v. *Securities and Exchange Commission*, 133 F. 2d 148, affirmed on the constitutional issue, 327 U.S. 686, the Second Circuit, without extended discussion of the statutory interpretation issue, upheld a divestiture order which the Commission had entered on the basis of its construction of Section 11(b)(1)(A).[9] In *Louisiana Public Service Commis-*

[9] Although its opinion is somewhat ambiguous on the point, it appears that the Second Circuit accepted the Commission's

sion v. *Securities and Exchange Commission*, 235 F. 2d 167, reversed on jurisdictional grounds, 353 U.S. 368, on the other hand, the Fifth Circuit—expressly eschewing legislative history (235 F. 2d at 172)—rejected the Commission's interpretation of that provision. Ruling that "substantial economies" are "important economies," the court stated (235 F. 2d at 173):

> The question of their importance must, of course, be determined by the bearing they have on the ability of the two systems to continue in the serving of the two commodities in general demand without substantial change in policy, serving practically in the same way, making substantially the same gains, suffering substantially the same losses.

Like the decision below, the ruling in the *Louisiana* case plainly conflicts with the decisions of the District of Columbia Circuit and, in effect, is at variance with that of the Second Circuit. Indeed, although the court below cited the *Louisiana* case with apparent approval (App. A, *infra*, p. 14a), it is by no means clear that the test adopted below is the same as that propounded by the Fifth Circuit.

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interpretation. The court stated (133 F. 2d at 152): "With the Commission's ruling that 'substantial economies' means important economies and not merely something more than nominal, we are in accord." In the decision there under review, the Commission, after quoting with approval the remarks of Senator Wheeler on the conference committee version of Section 11(b)(1)(A) (see n. 8, *supra*), stated, "These remarks reinforce the conclusion that Clause (A) was intended as a significant standard to be applied only when there was a strong reason for an exception to the general policy of permitting retention of only one integrated system." *North American Co.*, 11 S.E.C. 194, 209.

The need for this Court to resolve this conflict among the circuits as to the meaning of a key provision of an important regulatory statute is underscored by the fact that the decision below rejected an administrative construction of more than twenty years' standing. As we have noted, the Commission has consistently ruled that, under Section 11(b)(1)(A), a holding company may not retain an additional integrated utility system unless it can show that such system is incapable of independent economical operation (*supra,* p. 5). Under this test, more than $2,000,000,000 in utility assets have heretofore been divested on orders of the Commission (see App. B, *infra*).

2. This Court previously granted certiorari on the issue involved here, among others, in the *Louisiana* case, *supra,* but, having disposed of that case on jurisdictional grounds, found it unnecessary to reach that issue. In our petition in the *Louisiana* case, we noted with some particularity the importance of this question with respect to the future administration of the Act. The issue remains at least as important today; indeed, the number of potential proceedings in which Section 11(b)(1)(A) might be involved has increased.

Our petition in the *Louisiana* case pointed to possible future Section 11(b)(1) proceedings with respect to Delaware Power and Light Company, a registered holding company owning and operating substantial gas properties in combination with its principal electric system; Utah Power and Light Company, a reg-

istered holding company controlling, in combination with what appears to be its principal electric system, what may well be an "additional" electric public-utility system; New Orleans Public Service Inc., a subsidiary of a registered holding company owning and operating gas and electric properties;[10] and Columbia Gas System, Inc., a registered holding company which controls gas properties in seven States, some of which may not be retailable.[11] These situations still exist. The petition in the *Louisiana* case also referred to NEES, which is the subject of the present proceedings. The protracted NEES litigation has been the only major case under Section 11(b)(1)(A) which the Commission's limited staff has been able to conduct since the *Louisiana* decision.

In recent years there have been substantial changes and improvements in the state of the art respecting the operation of electric utilities,[12] and the holding

[10] In *Middle South Utilities, Inc.*, 35 S.E.C. 1, 15, the Commission stated that, in view of the fact that the City of New Orleans had purchase-option rights which would have been lost by severance, it did not propose to take action with respect to the gas properties at that time. On March 8, 1962, however, New Orleans Public Service Inc. was informed that the Commission might reopen these proceedings. On March 26, 1962, a bill was introduced in Congress for the purpose of exempting the company from the requirements of Section 11(b)(1), and bills for that purpose have been introduced in every Congress since then. The Commission has deferred action on the matter.

[11] See *Columbia Gas & Electric Corp.*, 17 S.E.C. 494, where the Commission reserved jurisdiction, *inter alia*, as to the retainability of certain gas properties controlled by Columbia.

[12] See Federal Power Commission, *National Power Survey*, Vol. I, p. 1 (1964).

company device may be expected to be employed with greater frequency to realize economies of scale to reflect these changes and developments. For example, an application is now pending before the Commission with respect to one such proposed new holding company, Northeast Utilities.[13] If the application is approved and the proposed transactions are consummated, Northeast Utilities will register and will have three large electric subsidiaries, two of which also own and operate substantial gas properties. Also, four public utility companies in the Northwest have jointly undertaken, through a company whose voting securities will be held by them in equal portions, to construct a hydroelectric project on the Snake River. Each of the ~~held by them in equal portions, to construct a hydroelectric project on the Snake River. Each of the~~ four sponsoring companies will become a public-utility holding company required to register unless an exemption can be obtained. Two of them, Montana Power Company and Washington Water Power Company, conduct substanttial electric and gas utility operations.[14] The construction of a large generating plant in New Mexico by four public-utility companies which are not now subject to the Act is also under discussion. If this should result in a plan providing for *pro rata* holding of the common stock of a new corporation by the sponsoring companies, each of them will become a

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[13] See Holding Company Act Release No. 15306 (Sept. 15, 1965).

[14] See Holding Company Act Release No. 15026 (March 3, 1964).

holding company and, unless an exemption will be available, will be required to register. Two of the sponsoring companies, Arizona Public Service Company and Tucson Gas & Electric Company, operate gas utilities in combination with their extensive electric operations. Problems under Section 11(b)(1)(A) would have to be resolved with respect to each of the foregoing systems.

3. As we have shown, the decision below is in conflict with those of other circuits on an important issue of statutory interpretation. Furthermore, we believe, that decision is erroneous. In rejecting the relevant legislative history, on which the Commission and the District of Columbia Circuit had previously relied, the court below adopted a test which, we submit, seriously undermines the major aim of Section 11(b)(1)—limiting a holding company's "control over operating utility companies to one integrated public-utility system" (H. Rep. No. 1903, 74th Cong., 1st Sess. 70). Nor does its test—"a business judgment of what would be a significant loss"—comport with the purpose of clause (A) to provide "definite and concrete circumstances under which exception should be made to the form of one integrated system" (*ibid.*).[15] Contrary to the accepted canons of construction, the court below apparently gave no weight whatsoever to the long-standing administrative construction of Section 11(b)(1)(A). Instead, it found questionable support in

[15] The court's subjective test is also incompatible with the congressional aim of encouraging voluntary divestiture. See Section 11(e) of the Act, 15 U.S.C. 79(e); H. Rep. No. 1903, *supra*, at 70; S. Rep. No. 621, 74th Cong., 1st Sess. 13.

what it perceived to be the "symmetry" of the statute.[16] But, as is often the case, the statute involved here is comprised of language drafted in the House, the Senate and in conference. There is no indication that "symmetry" is important or even relevant. Cf. *United States* v. *Mosley*, 238 U.S. 383.

4. Review of this issue is appropriate at this time and should not await the administrative proceedings on remand. If the Commission were there to determine that the gas properties are retainable under the First Circuit's test, there would be no possibility of the substantive issue being raised in this Court. On the other hand, should the Commission find the

[16] As part of its "symmetry" analysis, the court noted that the term "substantial economies" appears in the definition of "integrated gas utility system" in Section 2(a)(29)(B), 15 U.S.C. 79b(a)(29)(B), and that the Commission accepted its staff's acquiescence in NEES's contention that its gas companies comprised such an integrated system (App. A, *infra*, p. 12a; See R. 23–24, 46–47, 49, 772, 1256). The court then stated that "the Commission could not, either in good conscience or in law, accept as a concession a matter so fundamental, not only to the present proceedings, but for the future, if it were contrary to the fact" (App. A, *infra*, p. 12a, n. 8). The court's suggestion that the Commission may be deemed to have adjudicated an issue which, because of the mutual agreement of the parties, was not put before it for decision is wholly unwarranted. Moreover, the court's statement is contrary to the salutary practice in administrative proceedings of encouraging the parties, so far as possible, to narrow the issues to be considered by the agency. See, *e.g.*, Sections 5(a) and 7(b)(6) of the Administrative Procedure Act, 5 U.S.C. 1004(a), 1006(b)(6). If certiorari is granted, we intend to urge that this Court expressly disapprove any suggestion in the opinion below that agencies are not free to accept issue-narrowing concessions and stipulations.

gas properties non-retainable, even under the test set forth by the court below, it is not at all clear whether this Court would consider at that stage the question of the appropriate standard to be applied. Moreover, the administrative proceedings on remand would in no way clarify or sharpen the important statutory issue that this petition presents. In such circumstances this Court has indicated that it will review even an interlocutory decision which involves an issue "fundamental to the further conduct of the case." *United States* v. *General Motors Corp.* 323 U.S. 373, 377; *Land* v. *Dollar,* 330 U.S. 731, 734, n. 2.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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OCTOBER 1965.

APPENDIX A

United States Court of Appeals for the First Circuit

No. 6332

NEW ENGLAND ELECTRIC SYSTEM ET AL., PETITIONERS

v.

SECURITIES AND EXCHANGE COMMISSION, RESPONDENT

ON PETITION FOR REVIEW OF AN ORDER OF THE SECURITIES AND EXCHANGE COMMISSION

Before ALDRICH, *Chief Judge*, SWEENEY, *Chief Judge*, and WYZANSKI, *District Judge*.

John R. Quarles, with whom *Richard B. Dunn*, *Richard W. Southgate*, *John J. Glessner, III*, and *Ropes & Gray* were on brief, for petitioners.

David Ferber, Solicitor, with whom *Phillip A. Loomis, Jr.*, General Counsel, *Ellwood L. Englander*, Assistant General Counsel, *Martin D. Newman*, Attorney, and *Solomon Freedman*, Director, Division of Corporate Regulation, Securities and Exchange Commission, were on brief, for respondent.

OPINION OF THE COURT

June 4, 1965

ALDRICH, *Chief Judge*. This is a petition seeking to review and set aside a divestment order of the Securities and Exchange Commission pursuant to sec-

tion 11(b)(1) of the Public Utility Holding Company Act of 1935, 15 U.S.C. § 79k(b)(1), requiring the petitioner, New England Electric System (NEES) to dispose of its gas utility properties by terminating its relationship with its eight subsidiary gas companies. The ultimate question in the case, which the Commission resolved against NEES, was whether divestiture would cause the loss of "substantial economies" within the meaning of the cited section.

Briefly, NEES is a registered holding company controlling, at the time of the hearing, fourteen electric utility subsidiaries and eight gas subsidiaries, with some 824,000 retail electric customers in the states of New Hampshire, Massachusetts, Rhode Island and Connecticut, and some 237,000 retail gas customers in Massachusetts. Seventy-eight percent of its gas customers are also served by the electric companies. Except for certain peaks and emergencies the gas distributed is natural gas supplied by pipe line companies from the southern United States. The gas companies have separate offices and management, but their top officers are responsible to the top officials of NEES. There was a lengthy hearing before an examiner at which NEES sought to show that the cost of divestment to the electric system would be $804,000 annually, and to the gas system, if operated as a single unit after severance, $1,098,000.[1] The Commission held, *inter alia,* that the financial effect upon the electric system was not a relevant inquiry, but that if it was it was not significant. This we do not reach. It also held, which we do reach, that the claimed fi-

[1] NEES' actual figure was $1,165,000, but the Commission reduced this by $67,000 as a result of a "revised basis of payments" authorized by it. NEES does not presently dispute this adjustment, but points out that the reverse adjustment must be made to the estimated electric system losses.

nancial consequences to the gas system were not substantial as it construed the statute, but that if they were they had not been adequately proven.

Basic to its decision, as the Commisssion recognized at the outset of its opinion, is the meaning of the Act and the standards which it imposed. Briefly, section 11(b)(1) required divestiture unless NEES could satisfy the provisos or exceptions [2] contained in subparagraphs, or clauses, (A), (B) and (C). Clauses (B) and (C) were admittedly met. Clause (A) reads as follows:

> (A) Each of such additional systems cannot be operated as an independent system without the loss of substantial economies which can be secured by the retention of control by such holding company of such system;

Before considering whether the Commission's interpretation of this clause was correct we must determine what its interpretation was. At the beginning of its opinion the Commission stated that to prevent divestiture NEES must show,

> that the additional systems were integrated in nature and "were so small that they were incapable of independent economic operation" and had a "real economic need" for management together with the principal system. Congress was aware that some loss of economies would usually result from the separation of jointly controlled utility systems, but considered that continued joint management should be permitted only where separation would entail a loss of economies which would be sub-

[2] The Commission uses the word "exceptions," and criticizes NEES' word "provisos." NEES' distinction, as we read it, was in response to a heavy burden of proof which the Commission sought to attach to exceptions. See fn. 4, *infra*.

> stantial in the sense that they were important to the ability of the additional system to operate soundly. [Footnotes omitted.]

The Commission then quoted at length from a decision by the Court of Appeals for the District of Columbia,[3] from which it drew the conclusion that clause (A) required a "showing by clear and convincing evidence[4] that such additional system cannot be operated under separate ownership without the loss of economies so important as to cause a serious impairment of that system." Lastly, at the end of its opinion, the Commission concluded that on the record it was unable "to find that the gas companies could not be soundly and economically operated independently of NEES, even assuming the validity of * * * [its] estimates."

Thus the statutory phrase, "cannot be operated as an independent system without loss of substantial economies," was said to mean, "incapable of independent economic operation;" "important to the ability * * * to operate soundly;" "so important as to cause a serious impairment of that system;" and "could not be soundly and economically operated."

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[3] *Engineers Public Service Co.* v. *S.E.C.*, 138 F. 2d 936, 944 (1943). This case is extensively relied on in the Commission's opinion without noting that certiorari was granted, 322 U.S. 723 (1944), and the decision subsequently vacated as moot. 332 U.S. 788 (1947). This omission was remedied in its brief. We do not know whether the view of the majority, or the dissent of Judge Soper which accords with ours, would have ultimately prevailed.

[4] The Commission has been criticized before for using this phrase, the court allowing it to pass, however, on the ground that it meant no more than the fair preponderance of the evidence, the ordinary burden of proof. *Philadelphia Co.* v. *S.E.C.*, D.C. Cir., 1949, 177 F. 2d 720, 725. We do not agree.

In *Middle South Utilities, Inc.*, 35 S.E.C. 1, 11 (1953), its most recent decision cited in its opinion for the support of its interpretation, the Commission ordered a divestment because it had not been shown that it would "cause the serious economic impairment of the system *or* that the gas properties could not operate effectively and efficiently under separate ownership." [Italic supplied.] Since presumably the Commission did not intend to voice simultaneously two different standards we read the word "or" as introducing an explanation or equivalency. Essentially this second *Middle South Utilities* phrase is the sole standard that the Commission adopts in its brief before us.

Also may be noted the Commission's statement, in refutation of one of NEES' contentions, that "other independent gas utility companies in the state * * * nevertheless have been able to conduct their operations and, apparently, earn a fair return without the alleged advantages of common control with electric utilities by a holding company."

Taking the record as a whole we find its brief accurate, and that the Commission's interpretation is

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This phrase has a well recognized meaning, and is applied in special cases, such as fraud, *Lackawanna Pants Mfg. Co.* v. *Wiseman*, 6 Cir., 1943, 133 F. 2d 482, 486, or mistake, *Philippine Sugar Estates Devel. Co., Ltd.*, v. *Philippine Islands*, 1918, 247 U.S. 385, 391, as applied in *Aetna Ins. Co.* v. *Paddock*, 5 Cir., 1962, 301 F. 2d 807, 811. The Commission is to be criticized for continuing to use this language, which by its tone suggests to laymen, as well as to lawyers, a heavy burden. We suspect, from other statements in its opinion, that it accurately revealed the Commission's approach. If so, in any future proceedings the Commission should readjust its receptivity as well as its phraseology.

that a loss is not "substantial" unless it would render impossible "economical or efficient operation." [5]

As to the correctness of this interpretation we have not considered before the meaning of clause (A), and there is no uniformity of judicial view elsewhere. It is true that in *North American Co.* v. *S.E.C.*, 1946, 327 U.S. 686, 696–7, the court referred to section 11(b)(1) as permitting retention only of "relatively small [companies] * * * unable to operate economically under separate management without the loss of substantial economies * * *." This was a passing summary, and did not purport to be an exact characterization. The precise meaning was not relevant to the constitutional questions then under consideration, and even if the court's language is not considered ambiguous we do not take it as an attempt to resolve possibly intricate questions of construction. We turn, therefore, to other considerations.

Although we do not regard the legislative history as determinative, we begin there as the Commisison makes much of it. Its principal reliance is upon the concluding remarks of Senator Wheeler on the floor after the bill had finally passed both branches. Senator Wheeler stated, *inter alia,* that the act permitted a holding company to retain more than one integrated system only when the additional systems "* * * were so small that they were incapable of independent

[5] NEES suggests there is no practical difference between preventing economical operation and bankruptcy. The Commission does not address itself to this question. We assume it believes there to be a difference, but except to the extent suggested in fn. 7, *infra*, we cannot find from its opinion what the difference is, or, more important, what is the standard by which uneconomical operation is determined. The very serious problem which this would present we do not reach because we disagree with the Commission's basic interpretation.

economical operation." 79th Cong. Rec. 14479 (Aug. 24, 1935). We may note, at the outset, that only by a most generous interpretation is this statement part of the legislative history. Having come afterwards, it could not have affected the voting. The best reason for considering it as evidence of Congressional intent, see *United States* v. *United Mine Workers,* 1947, 330 U.S. 258, 279–80; *Duplex Printing Press Co.* v. *Deering,* 1921, 254 U.S. 433, 477; *cf. State Wholesale Grocers* v. *Great Atlantic & Pacific Tea Co.,* D.C.N.D. Ill., 1957, 154 F. Supp. 471, 485, *rev'd on other grounds,* 258 F. 2d 831, *cert. den.* 358 U.S. 947, is accordingly absent.[6] Furthermore, coming from the leading Congressional advocate of strict separation, see *e.g.,* 79 Cong. Rec. 1525, Feb. 6, 1935; *id.,* 4903 (radio address of April 2, 1935); *id.,* 14470, Aug. 24, 1935 (remarks of Senator Norris), it would seem natural to regard it, at that stage of the proceedings, as a self-serving declaration. To the cynically minded it would seem to have been merely a post-contest attempt to raise the score, recapture what had been lost in the compromise with the House discussed *infra,* and to serve, just as is now being sought, to influence subsequent history. The best that should be said for

[6] See Hart and Sacks, The Legal Process: Basic Problems in the Making and Application of Law (tent. ed. 1958) 1285:

"The views of individual members of the legislature as to the meaning of a statute which were not officially communicated to the legislature prior to its enactment are not competent to be considered in determining the meaning which ought to be attributed to the statute."

Nor could it have invited a presidential veto, since the President was a known advocate of a strong bill. See 79 Cong. Rec. 3425–26, 3469–70, March 12, 1935 (Message to Congress); *id.* at 9042, June 11, 1935 (letter to Senator Barkley and Senator Wheeler); *id.* at 14164, Aug. 22, 1935 (letter to Representative Rayburn).

Senator Wheeler's statement under these circumstances is that it is not to be given the weight to which it might have been entitled if made at another time.

The other pieces of legislative history related in the Commission's brief are a quotation from remarks by Representative O'Connor speaking "of 'a little power plant in Florida' or 'a little plant in Oklahoma' (79 Cong. Rec. 14168, Aug. 22, 1935)" and one from Representative Cooper, "who had opposed the motion, [and] had referred to systems retainable under Clause (A) as 'unprofitable companies * * * too weak to stand alone' (*id.* at 14165–14166)." Examination of Representative O'Connor's full statement rebuts the economic implication the Commission wishes us to attach to the word "little." It is evident that the remarks were addressed to geographical aspects, the absentee landlordism condemned in clause (B). It is true that Representative Cooper was speaking of clause (A). But it seems apparent that as an opponent of the bill he was strategically engaged in blackening it. According to him the compromise was no compromise whatever, a position demonstrably unsound. His interpretation of particular clauses must be read in that light. *Labor Board* v. *Fruit & Vegetable Packers & Warehousemen, Local No. 760*, 1964, 377 U.S. 58, 66.

A much more pertinent characterization of the phrase "substantial economies" is found in the statement of the House Managers attached to the conference report recommending passage of the compromise draft, that the retention of additional systems was to be permitted where there was a "real economic need." H.R. Rep. No. 1903, 74th Cong., 1st Sess., 71. This language, however, is itself ambiguous. Obviously there would be a real economic need to prevent

a loss that would preclude efficient or effective operation. But there could also be said to be a real economic need to avoid any truly sizable financial loss notwithstanding the utility's ability to absorb it and remain efficient in some absolute sense.' For reasons we now come to we believe the statute is to be given this more general meaning.

The declaration of legislative objectives is found in section 1(b). Subsection (1) thereof concerns improper accounting practices, capitalization, etc., that may injure investors. Subsection (2) refers to excessive charges and other effects of transactions among companies within a holding company system. It also, together with subsection (3), refers to impediments occasioned by the holding company device to state regulation. We quote in full the remaining subsections, which declare the public interest to be adversely affected,

> (4) when the growth and extension of holding companies bears no relation to *economy of management and operation* or the integration

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[1] We have already commented upon the Commission's failure to enunciate any standard beyond this broad generalization of economy or efficiency. See fn. 5, *supra*. Possibly its views are partly implied by the points made in its opinion when assuming that an annual loss of $1,098,000 had been adequately established. The first was that while this amount is larger, absolutely, than losses required to be accepted in any previous case, it is not larger relatively. Secondly, that the loss would be only 23.98% of gross income, and 29.94% of net income before federal income taxes. (The word "only" is ours.) Third, that there are "other independent gas utility companies in the state which nevertheless have been able to conduct their operations and, apparently, earn a fair return * * * and * * * compete effectively. * * *" Finally, that it "would be entering the realm of speculation at this time to assume that rate increases would ensue from severance."

> and coordination of related operating properties; or
>
> (5) when in any other respect there is *lack of economy of management and operation* of public-utility companies *or lack of efficiency and adequacy of service* rendered by such companies, or lack of effective public regulation, or lack of economies in the raising of capital. [Italic supplied.]

Pausing here we note in the italicized phrases two concepts, economy of management and operation, and efficiency (and adequacy) of service. The word "or" in clause (5) is clearly used in the disjunctive. This separate meaning is emphasized when we come to section 11(b)(1) clauses (A) and (C), *infra*. It will be sufficient to note here, for both present and future purposes, that the Commission has taken the word "efficient" from this use in connection with service and joined it with the phrase "economy of management and operation," and has then built out of the combination the concept that until a loss of economy and efficiency is shown to be total there has been no loss of substantial economies under clause (A) within Congressional concern. We may note, also, an omission which we take seriously, that on the sole occasion that the Commission quoted clause (4) it substituted asterisks for the phrase we have italicized, and, although the legislative meaning of economies is the specific matter under consideration, has never referred to it. Clause (5), likewise, is never mentioned.

The definitions of "integrated public-utility systems" are found in section 2(a)(29). Subsection (A) defines an integrated electric system as one which, *inter alia*, "may be economically operated as a single interconnected and coordinated system." Subsection (B) defines a gas system as where, *inter alia*, "substantial

economies may be effectuated by being operated as a single coordinated system." During argument we inquired the reason for this difference. No suggestion was forthcoming. The only reason apparent to us is that in order for electric companies to constitute an integrated public utility system they must meet a technical requirement not applicable to gas companies seeking to qualify as an integrated system. Unlike gas companies, *General Pub. Util. Corp.*, 1951, 32 S.E.C. 807, 834–35, electric companies must be "physically interconnected or capable of physical interconnection." Where this requirement is met, so that actual interchanges of power could be made to meet power requirements at different points in the system, it was enough for Congress that the system as a whole "may be economically operated as a single interconnected and coordinated system." Assuming the other qualifications were met electric companies would not have to prove that system ownership would be cheaper than independent ownership, probably because this could safely be assumed where there would be a sharing of power.

Coming to section 11(b), the primary provision, subsection (1) requires that holding companies be restricted to a single integrated public utility system except when subclauses (A), (B) and (C) are satisfied. For clarity we quote in full.

> (A) Each of such additional systems cannot be operated as an independent system without the loss of substantial economies which can be secured by the retention of control by such holding company of such system;
>
> (B) All of such additional systems are located in one State, or in adjoining States, or in a contiguous foreign country; and

> (C) The continued combination of such systems under the control of such holding company is not so large (considering the state of the art and the area or region affected) as to impair the advantages of localized management, efficient operation, or the effectiveness of regulation.

These exceptions to section 11(b)(1) were added as a result of a compromise with the House. The original Senate bill had flatly restricted holding companies to a single integrated system. S. 2796, 74th Cong., 1st Sess. (1935). The House sought to permit as many systems as were consistent with the public interest. See H.R. Rep. No. 1318, 74th Cong., 1st Sess. 17 (1935). The Commission's then chairman objected that this would be intolerably indefinite. 79 Cong. Rec. 10838 (July 9, 1935); see also H.R. Rep. No. 1318, *supra*, at 45. Clauses (A), (B) and (C) were proposed as a compromise to establish "definite and concrete circumstances" where retention of more than one system would be allowed. Statement of House Managers, *supra*, at 70.

It is basic to the Commission's position that the phrase "substantial economies which can be secured by the retention of control" in clause (A) is fundamentally different from "substantial economies [that] may be effectuated by being operated as a single coordinated system" in section (29)(B).[8] Such a con-

[8] The Commission is committed to this, and expressly so recognizes in its brief, because it rejected certain important evidence offered by NEES solely on the ground that the eight gas companies were conceded to be "a single integrated system." Since the Commission could not, either in good conscience or in law, accept as a concession a matter so fundamental, not only to the present proceedings, but for the future, if it were contrary to the fact, it stands that the Commission feels that saving $329,400 annually by integrating the eight gas companies

tention, of course, is opposed to the common principle that the same words in different portions of an act are presumed to have the same meaning. In this case they are exactly the same.[9] To overcome the presumption calls for an affirmative showing.[10]

Furthermore, we find the Commission's interpretation of clause (A) opposed to the initial statement of the purposes of the Act, *supra*, the tenor of which was that holding companies had been found uneconomical to investors and to the public. It is not inconsistent with this to say that systems which do not offend in this respect, or in the other respects defined in clauses (B) and (C), should be continued instead of broken up, and that occasioning a loss of impressive proven economies was not the Congressional purpose. This was a business reorganization act designed to produce a healthier economic structure in a vital industry. It established what, in the opinion of Congress, accomplished the best overall conditions. At the same time, Congress remained receptive to what, in a particular

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is effectuating substantial economies under section (29)(B), but that $1,098,600 annually is not substantial economies under clause (A).

[9] The Commission's brief goes to some length in emphasizing the word "loss" in section 11(b)(1)(A). Sections 2(a)(29)(B) and 11(b)(1)(A) are not incomparable because the former speaks in terms of effectuating and the latter in terms of losing. The important comparison is the word "effectuated" in the one section and "secured" in the other. Both relate directly to "substantial economies."

[10] In a special effort to make this showing counsel argues that there is a policy in the Act against an electric utility system being combined with a gas system. The short answer to this is that neither the Act, nor the Commission itself, says so. Since, however, counsel's argument is extensive we will reply in kind, but in order not to prolong this footnote we will do so in an appendix, *infra*.

instance and within the limits established by clauses (B) and (C), might be affirmatively shown to be a more economical arrangement. We hold that clause (A) called for a business judgment of what would be a significant loss, not for a finding of total loss of economy or efficiency. *Louisiana Pub. Serv. Comm'n* v. *S.E.C.*, 5 Cir., 1956, 235 F. 2d 167, *rev'd on jurisdictional grounds*, 353 U.S. 368.

We are confirmed in this view by the fact that not only do clauses (B) and (C) contain additional conditions of retention, so that clause (A) need not be interpreted so as to cover the entire Congressional intent, but that these other clauses relate back fully to counterparts of the declarations of purpose made in section 1(b), and the attempts to effectuate those purposes through the definitions made in section 2(a)(29), *supra*. Clause (A) would do the same were it not for the special restricted meaning that the Commission seeks to give it. The Commission, in other words, has attached to "substantial economies" in this one particular place a special meaning that nothing in the Act points to, and which, in fact, destroys its symmetry.[11]

It might not be inappropriate to conclude with the quotation with which the Commission began a section of its brief. "As was stated [the brief says] in the

[11] Drawing an equivalence between the proviso contained in clause (A) to section 11 and the corresponding requirements for an integrated gas system under section 2(a)(29)(B) nullifies no technical requirements in the definition of an integrated gas system because there are none. The definition of an integrated electric system under section 2(a)(29)(A) does contain some technical requirements, as has been pointed out, but these, also, are not nullified by our interpretation of clause (A) since it remains stricter than section 2(a)(29)(A)'s requirement that the electric system "may be economically operated."

report of the National Power Policy Committee: '[I]ntensification of economic power beyond the point of proved economies not only is susceptible of grave abuse but is a form of private socialism inimical to the functioning of democratic institutions and the welfare of a free people.' * * * H. Doc. No. 137, 74th Cong., 1st Sess. 4 (1935), appended to S. Rep. No. 621, 74th Cong. 1st Sess." We cannot think that "proved economies," any more than "substantial economies," mean anything other than economies which in ordinary business parlance and by ordinary business standards are of a substantial nature, considering, of course, the size of the companies to which the economies relate.[12] Clearly that was what was meant elsewhere in the Act. If in clause (A) Congress meant, instead, "cannot be operated efficiently as an independent system" it could readily have done so not only more clearly, but in fewer words.

The Commission's only answer is "the policy of the Act." We think the policy of the Act is to be found in the whole Act, not in one part. NEES has the burden of proving that it falls within an exception. This is enough, without a forced reading into that exception of some special meaning.

We regret the length of this discussion. Since, however, we find the Act not only consistent, but entirely responsive to analysis, we feel such analysis called for in fairness to those persons, whether investors or consumers,[13] who must absorb perhaps a

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[12] In this case the claimed losses are over 23% of gross income. See fn. 7, *supra*.

[13] The Commission's finding it significant that it was insufficiently shown that this loss would require an increase in rates "at this time," fn. 7, *supra*, not only disregards the fact that the cost of doing a utility business normally is passed on to consumers eventually, but the fact that one of the purposes of the Act was to benefit legitimate investors.

million dollars a year (quite apart from over $800,000 allegedly lost to the electric system) which the Commission feels insubstantial.

The Commission having applied the wrong standard, its decision must be reversed unless on the record there could have been no finding in NEES' favor on the appropriate standard. We think clearly there could have been. NEES' case was based essentially upon a study made for it by Ebasco Services, Inc., (Ebasco), a management consultant which the Commission found possessed extensive experience in the utilities field. No rebuttal evidence, other than some exhibits, was offered on behalf of the Commission, which grounded its rejection of the report, to the extent that it did reject it, solely on criticism of the report's conclusions in the light of NEES' evidence or its own expertise. Its specific criticisms related to that portion of the report which dealt with certain costs totalling $472,100 or, more specifically, for the most part, customer and accounting costs included therein, for which the Ebasco estimate was $415,600. The first criticism concerned billing. The circumstances were these. Ebasco's original study was made on the assumption that the gas companies would be individually managed. On this hypothesis it naturally assumed that each company would conduct separate customer billing. When the Commission took the position that the gas companies constituted a single integrated system and should be sold as such, Ebasco was required to reduce its estimate by the amount attributable to operating the gas companies individually rather than as a unit. It made no reduction with respect to customer billing.

On this subject NEES called three witnesses. One Quig, a representative of Ebasco with ample qualifications, testified to certain accounting savings that could

be effected if the gas companies were operated collectively rather than individually. He stated, however, that Ebasco would not recommend, at least at the outset, centralization of certain matters, including billing; that a continuing study might show that further centralization would prove useful, but that it was by no means clear that economy lay in that direction, and that it would depend on such factors as business growth, new developments in mechanization, etc. Subsequently one Dalbeck, the principal officer of NEES' gas division, testified that it was conceivable that centralized billing might be effected to some degree, but that in his opinion it was not really important cost-wise; that he had made many studies of customer accounting procedures and had never found any real economies in centralization of billing. Thereafter one Johnson, an Ebasco representative with particular experience in customer accounting, testified that a detailed study would have to be made, which Ebasco had not done; that based upon his experience he had considered centralized billing for the combined operation and had made the judgment that there would be no economy, or at least "any substantial savings." The witness was cross-examined at length and showed a wide knowledge not only of specialized mechanical equipment in this area and the problems involved, but also of the particular practices of a large number of named utilities in various parts of the country. He recognized that in many instances centralized billing prevailed, but continued to express doubts as to how much was saved thereby.

The Commission's response to this was to point out that some of the NEES gas companies presently combined their billing with the electric companies in their areas. This matter had been explained by NEES' witnesses, who pointed out, *inter alia*, the duplication

of customers, which would not exist in the case of gas companies operating alone. The Commission concluded, however, that NEES had not "given any satisfactory reason why at least some form or forms of combined billing procedure could not be employed advantageously by the gas companies, in light of the fact that their aggregate of 237,000 customers is located in a relatively compact area."

We have serious doubts as to the extent that the Commission is entitled to disregard an opinion on a matter obviously requiring expert, specialized knowledge with no further evidence before it than what had been considered by the accepted expert. *Cf. United Shoe Mach. Corp.* v. *Industrial Shoe Mach. Corp.,* 1 Cir., 1964, 335 F. 2d 577, 579, *cert. den.* 379 U.S. 990; *Security-First National Bank* v. *Lutz,* 9 Cir., 1963, 322 F. 2d 348, 355; *Alvary* v. *United States,* 2 Cir., 1962, 302 F. 2d 790, 794; *Cullers* v. *Commissioner,* 8 Cir., 1956, 237 F. 2d 611, 616. This is not a matter on which a body having such broad jurisdiction as the Commission can have detailed expertise upon which to base affirmative findings. Compare *Market St. Ry.* v. *Railroad Commission,* 1945, 324 U.S. 548, 560. Without finally passing upon this point, since the case must go back in any event, we suggest that on this record the maximum the Commission was warranted in inferring was that the difference in costs between separate and combined billing would not, if significant at all, constitute a sizable portion of the total added billing expense.

This brings us to what was the added billing expense, and hence the amount of error attributed to the Ebasco report because of its failure to assert the saving which, in the Commission's opinion, could be effected by having centralized billing. The Commis-

sion concluded merely that Ebasco's failure caused the estimate to be "overstated." It did not concern itself with discovering even what were the total increased billing costs, let alone the portion (obviously not the whole) which might be saved if centralized billing were adopted. It did find that the increased billing costs estimated for two of the eight gas companies, billing singly after divestiture, was $34,700 for the two. These companies covered more than half of NEES' gas customers. On a pro rata basis this would make the total billing increase for all companies $60,000. While doubtless such a projection is not precise, it seems significant that the Commission was not sufficiently interested to make any at all. Under the circumstances we do not think it unreasonable for us to point out that while the Commission was purportedly criticizing a cost estimate of over $400,000, strictly it was speaking of perhaps $60,000, only a portion of which could have been overstated.

We might have more sympathy with some, but not all, of the Commission's criticism of certain other alleged accounting disparities. Frankly, we are not sufficiently versed, nor do we find the record sufficiently helpful, to permit our analyzing them in every detail. However, it has not been contended that, even cumulatively, they remove from the Ebasco $472,000 cost estimate many sizable items.

After discussing the above matters the Commission said,

> In view of respondent's burden of proof and the absence of a persuasive explanation on the record, Ebasco's failure to consider employment of combined billing procedures and its inadequately explained disparate treatment of certain effects of severance on the gas and electric companies, respective, substantially impair the

> credibility and preclude the acceptance of its estimate of $472,100 increase in treasury and accounting costs and, in turn, of its over-all estimate of increased costs (of which that figure is a material part) in the determination of whether severance would result in a substantial loss of economies.

If this constitutes a finding that the deficiencies which the Commission believes it has found are so serious that the Commission was entitled to reject the balance of the report from that very fact, we cannot agree. The doctrine of *"falsus in uno, falsus in omnibus,"* so far as it has any value, ordinarily applies to cases of deliberate falsehood. See 3 Wigmore, Evidence § 1013 (3d ed. 1940). The Commission has not suggested, and we see no possible basis for suggesting, that the discrepancies it complains of indicate bias or dishonesty. Absent a finding that the errors found are related to, or infect, other matters not directly discredited, if the *"falsus in uno"* doctrine, or a corollary, is to be used on any further basis to impeach an expert's report, it must be shown that the errors are so serious that they indicate substantial carelessness, or otherwise impugn the expert's qualifications. See *e.g., Hoag* v. *Wright,* 1903, 174 N.Y. 36, 43; 66 N.E. 579, 581. Again, the Commission made no such findings. If there was a ground for them it has not been suggested. Indeed, the Commission demonstrated its confidence in Ebasco elsewhere by accepting its cost estimates as the basis for concluding that the gas companies constitute an integrated system.

On the record there is a large, residual showing in the Ebasco report. Even at minimum it is $1,098,000 minus some fraction of $472,000. However, we do not think it presently appropriate for us to consider whether such minimum showing meets our interpreta-

tion of "substantial economies." We do state, however, that on remand the Commission must address itself to this problem by making specific findings, and not content itself with general conclusions. One illustration of this will suffice. The Commission states in its brief that it "had the right to consider competitive advantages of separation in offsetting alleged losses of economies." We do not question this. What we do question is the Commission's failure to find or articulate any specific or approximate financial benefit that such a change would occasion. Free competition, as the Act recognizes is normally beneficial. It is not necessarily so, nor in any assumed amount. The various automotive divisions of General Motors seem to do very well. More close to home, the Massachusetts Department of Public Utilities, which voices no apparent criticism of a number of combined local gas and electric companies within the Commonwealth, affirmatively appeared in opposition to the Commission's proceeding in the present case. The Commission states that the Department's views have been "carefully considered," but it goes no further. If the Commission is of opinion that substantial gains will accrue to the gas system by placing it in competition with the electric companies rather than, in part, under the same roof, specific findings should be made, and not just a general reference to the advantages of competition. This is particularly called for where the evidence shows that NEES has made a special effort to obtain for its gas system many of the benefits of independence.

Decree will be entered vacating the order of the Commission and remanding for further action not inconsistent herewith.

In the Commission's brief counsel argues that section 11(b) embodies a federal concern with use of the holding company form to combine a gas system with an electric system. There are several answers to this. In the first place, it is too specialized an approach. The meaning of this section and of sub-clauses (A), (B) and (C) must be the same whether the principal system and the additional systems are of like nature or are different. "Substantial economies," in other words, should have the same connotation in the one case as in the other.

Secondly, nowhere in the Act is there a condemnation of the retention of gas and electric systems, provided the tests contained in clauses (A), (B) and (C) are met. To the contrary, section 8 prohibits a holding company's acquisition of gas and electric utilities serving the same territory, where state law prohibits combined gas and electric operations, without express approval of the state commission. If anything, this is a negative pregnant, as the Commission has recognized and the legislative history makes clear. See *Northern States Power Co.*, 1954, 36 S.E.C. 1, 8; S. Rep. No. 621, 74th Cong., 1st Sess., 29-30; H.R. Rep. No. 1318, *supra*, at 14–15; Report of National Power Policy Committee, H.R. Doc. No. 137, 74th Cong., 1st Sess. 10 (1935), appended to S. Rep. No. 621, *supra*, at 59; Hearings Before House Committee on Interstate and Foreign Commerce on H.R. 5423. 74th Cong., 1st Sess. 330 (1935) (statement of Rep. Ray-

burn). How far such an inference may be carried in the light of the fact that section 10(c), which prescribes the standards for acquisitions, expressly incorporates the retention standards, and requires further that an acquisition tend toward the development of an integrated system, may be questioned. *Cf. American Water Works & Elec. Co.*, 1937, 2 S.E.C. 972, 983 & n. 3; *Columbia Gas & Elec. Corp.*, 1941, 8 S.E.C. 443, 462–63; *American Gas & Elec. Co.*, 1946, 22 S.E.C. 808, 815. But at the least we find neither there nor elsewhere in the Act a general policy of opposition to gas and electric company joinder.

Nor, if the matter could be thought to be illuminated by administrative practice, has the Commission previously made such an interpretation, nor does it now. In its opinion the Commission stated, "We do not take the view that the Act expresses a federal policy against combined gas and electric operations as such." Counsel's attempt to explain this away by saying the Commission's phrase "as such" meant simply that the Commission was disclaiming interest when the interstate holding company form was not employed, attributes to the Commission the banality that it was not claiming jurisdiction in those cases where obviously it does not have it. We believe the Commission was saying sometning more than this, and that counsel, in the brief is merely seeking some new ground to support the Commission's result.

Decree

June 4, 1965

This cause came on to be heard upon petition to review and set aside an order of the Securities and Exchange Commission, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The order of the Commission is vacated, and the case is remanded for further action not inconsistent with the opinion filed today.

By the Court:

(S) Roger A. Stinchfield,
Clerk.

Approved,

(S) Aldrich, *Ch. J.*

APPENDIX B

On the following pages is a table of cases in which the Commission directed registered holding companies to divest themselves of securities or properties upon the specific finding that they constituted systems which were not retainable under Section 11(b)(1)(A) of the Act. In certain of these cases, the Commission also found that the electric or gas companies (or properties) involved were not retainable under other standards of Section 11(b)(1) as well. The chart does not include dispositions of securities or properties by registered holding companies that occurred in probable anticipation that the Commission would find that they could not meet the retention standards of Clause (A).

Top holding company	Citations	Majority interests divested [1]	
		Number of companies	Aggregate assets
The North American Co., et al.	11 S.E.C. 194 (1942)	6	$554,473,003
	18 S.E.C. 611 (1945)	1	13,129,400
Engineers Public Service Co., et al.	12 S.E.C. 41 (1942)	1	19,019,927
Cities Service Power & Light Co.	14 S.E.C. 28 (1943)	13	59,995,535
Middle West Corp., et al.	15 S.E.C. 309 (1944)	4	97,751,921
Cities Service Co., et al.	15 S.E.C. 962 (1944)	13	More than 148,258,253
Peoples Light and Power Co., et al.	20 S.E.C. 357 (1945)		
American Gas and Electric Co., et al.	21 S.E.C. 373 (1945)	3	97,684,103
Commonwealth & Southern Corp., (Del.), et al.	26 S.E.C. 464 (1947)	6	722,259,916
Pennsylvania Gas & Electric Corp., et al.	28 S.E.C. 553 (1948)	2	2,093,558
Philadelphia Co., et al.	28 S.E.C. 35 (1948)	3	113,605,913
Eastern Utilities Associates, et al.	31 S.E.C. 329 (1950) 40 S.E.C. 162 (1960) HCAR 18020 (1964)	1	12,234,309
General Public Utilities Corp.	32 S.E.C. 807 (1951)		
Middle South Utilities, Inc., et al.	35 S.E.C. 1 (1953) 40 S.E.C. 193 (1960)	1	19,061,622
Totals		54	1,859,567,460

[1] In more than three-quarters of these instances, the holding company owned at least 90 percent of the outstanding voting securities of the divested subsidiary, and in only one instance did holding company ownership amount to less than 65 percent of such securities.

[2] These are cases in which the divestment of specific physical properties, as distinguished from utility companies, was ordered. In some instances, after divestiture was ordered, the properties

Physical properties divested [2]		Minority interests divested [2]	
Number of seller companies	Properties divested	Number of companies	Investments divested
		2	$104, 685, 086
1	4, 551, 309		
1	Not available		
1	182, 000		
		1	255, 851
1	13, 757, 386		
4	18, 490, 695	3	104, 940, 937

were transferred by the owner company to a newly organized subsidiary, whose stock was subsequently disposed of.

[2] These figures represent the consideration received by the holding companies upon disposition of their minority interests.

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